

# Book Review

## Postmodernism Meets Practical Reason

*Law and Truth.* By Dennis Patterson.\* Oxford & New York: Oxford University Press, 1996. Pp. 189. \$39.95.

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There is a comedy sketch in which a man, looking confused, knocks on several doors in search of his appointment. When he reaches the right office, he is pointed to his chair, which faces a second man, seated behind a large desk and looking supremely confident. "Is this the right room for an argument?" asks the visitor tentatively.

"I've told you *once*," replies the host.

"No you haven't," says the guest.

"Yes I have," repeats the host.

Eventually, the visitor breaks the chain. "Look, this isn't an argument," he protests, earnestly.

"Yes it is," says the host.

"No it isn't, it's just contradiction," says the visitor.

"No it isn't," says the host.

This goes on, until finally the visitor interjects: "An argument is a connected series of statements to establish a definite proposition . . . contradiction is just the automatic gainsaying of anything the other person says."

"No it isn't," answers the host, pressing a bell to signify the end of the meeting.<sup>1</sup>

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1. The full version of this sketch appears in 2 GRAHAM CHAPMAN ET AL., *THE COMPLETE MONTY*

Dennis Patterson is here for an argument. *Law and Truth*,<sup>2</sup> Patterson's most ambitious work to date, is both an intellectual tour de force and a good, old-fashioned street brawl. The book appears to have been modeled on the 1980s comeback tour of the boxer George Foreman, who lined up a new opponent at each match and proceeded to knock all of them out. Patterson devotes a chapter to each of six major schools of contemporary jurisprudence: legal formalism, legal realism, legal positivism, and the jurisprudential theories of Ronald Dworkin, Stanley Fish, and Philip Bobbitt. He explains why each is seriously or fatally flawed and, in the concluding chapter, presents his own alternative formulation. In so doing, he takes on seemingly all of the major figures of contemporary legal thought. Yet, his conclusion—a powerful defense of law's integrity as a social and argumentative practice—will be appealing and even comforting to many lawyers. It is a potent rejoinder to the various "law and" movements and, I will argue, is consistent with the emerging long-term direction of the legal academy.

Patterson's argument is as simple as it is unique. Existing theories of jurisprudence, ranging from law and economics to Critical Legal Studies (CLS) to the interpretive theories of Dworkin and Fish, are deficient because they rely on nonlegal formulas—e.g., economic efficiency, moral principles, or contemporary literary theory—to determine the truth of propositions of law.<sup>3</sup> In fact, Patterson argues, legal truth is not a matter of any such formulas. Instead, truth is signified by success in the forms of legal argument, which externally generated theories can describe or evaluate but never completely capture.<sup>4</sup> Borrowing from both the later writings of Ludwig Wittgenstein and contemporary analytic and postmodern philosophers, Patterson describes law as a social, argumentative practice with its own rules and integrity, rather than as a second-order activity to be understood in the language of some other discipline.<sup>5</sup> To understand law, per Patterson, is to understand what lawyers actually say and do; contemporary theories obscure or misconstrue this reality and accordingly do more harm than good.

Described in these terms, *Law and Truth* is a sophisticated but somewhat obscure theoretical tract.<sup>6</sup> Its practical implications, however, are striking indeed. Patterson has written a powerful brief for what is essentially a traditional approach to legal teaching and scholarship, an approach that takes

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PYTHON'S FLYING CIRCUS: ALL THE WORDS 86-88 (Roger Wilmut ed., 1989).

2. DENNIS PATTERSON, *LAW AND TRUTH* (1996).

3. See *id.* at 181-82. A more complete description of Patterson's argument is provided *infra* Part I.

4. See PATTERSON, *supra* note 2, at 181-82.

5. See *id.* at 169-79.

6. For reviews emphasizing the philosophical side of Patterson's argument, see, for example, David Bakhurst, *Truth, Philosophy, and Legal Discourse*, 47 U. TORONTO L.J. 395 (1997) (book review); and Ken Kress, *Modern Jurisprudence, Postmodern Jurisprudence, and Truth*, 95 MICH. L. REV. 1871 (1997) (book review). For a more extended discussion, see *Law, Truth, and Interpretation: A Symposium on Dennis Patterson's Law and Truth*, 50 SMU L. REV. 1563 (1997) [hereinafter *Law, Truth, and Interpretation*].

seriously conventional legal materials (cases, statutes, and so forth) and has a markedly reduced dependence on nonlegal sources. His book thus provides important theoretical support for those, like Anthony Kronman, who seek to reassert the traditional legal virtues of "prudence" and "practical reason" and prevent law from becoming a mere province of economics or other external disciplines.<sup>7</sup> Although he never uses the term "practical reason," Patterson emphasizes case-by-case balancing of the forms or "modalities" of legal argument, with no single overriding principle determining the outcome. This method has strong intimations of a practical reason approach. Similarly, his emphases on specifically legal materials and arguments suggest that traditional legal scholarship, with its emphases on precisely these materials, is likely to prove most productive, while much of the avant garde legal academy, with its emphasis on nonlegal sources, may essentially be wasting its time.

Both the intellectual and practical aspects of the traditionalists' perspective thus find echoes in Patterson's book. Moreover, by using the latest in postmodern and analytic philosophy to justify a reliance on traditional sources, Patterson threatens to turn contemporary jurisprudence on its head, casting Kronman and his allies as the true revolutionaries and the various "law and" theorists as representatives of a grand but declining intellectual past. His book thus provides important theoretical ballast for what has been a largely ad hoc response to the invasion of nonlegal disciplines.

This Review focuses on the implications of *Law and Truth* for statutory interpretation, which has been of interest to me in the past.<sup>8</sup> Here, as

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7. See ANTHONY T. KRONMAN, *THE LOST LAWYER* (1993). Kronman uses the term "practical wisdom" to describe the pragmatic, problem-solving abilities associated with the traditional "lawyer-statesman" as contrasted with the social science and other methodologies preferred by today's legal scholars. See *id.* at 11-14 (setting forth the "lawyer-statesman" ideal); *id.* at 41-43 (describing the concept of practical wisdom); *id.* at 265-69 (contrasting practical wisdom with the methodology of contemporary legal scholars). William Eskridge, Philip Frickey, and other scholars use the term "practical reason" to describe an interpretive method that eschews universal theory in favor of a case-by-case, balancing approach. See, e.g., William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 322 n.3 (1990). Although these terms are used somewhat differently, they share an antifoundational character and an emphasis on pragmatic reasoning tools, and they proceed from common intellectual roots. See KRONMAN, *supra*, at 41-43 (tracing practical wisdom to the Aristotelian concept of deliberation in personal and political matters); Eskridge & Frickey, *supra*, at 323-24 (tracing practical reason to the Aristotelian idea of *phronesis* and the work of modern pragmatic philosophers).

Not all legal scholars share Kronman's (or Patterson's) enthusiasm for traditional legal methods or their skepticism of "external" theory. See Richard Posner, *Legal Scholarship Today*, 45 STAN. L. REV. 1647, 1657-58 (1993). As Posner writes:

In the reorientation of legal scholarship from the legal profession to the university, something has been lost, but less than the traditionalists believe . . . . A certain professionalism, a certain dependability, a certain craftsmanship has been lost, but intellectual sophistication has been gained, along with a broadening of legal scholarship that has for the first time enabled it to touch, and potentially to enrich, neighboring fields.

*Id.*

8. See, e.g., Michael Livingston, *Congress, the Courts, and the Code: Legislative History and the Interpretation of Tax Statutes*, 69 TEX. L. REV. 819 (1991) [hereinafter Livingston, *Legislative History*]; Michael A. Livingston, *Practical Reason, "Purposivism," and the Interpretation of Tax Statutes*, 52 TAX L. REV. (forthcoming 1998) [hereinafter Livingston, *Purposivism*].

elsewhere, Patterson's critique is extreme. According to *Law and Truth*, the emphasis on interpretation (statutory and otherwise) in contemporary legal theory is misplaced, with scholars tending to exaggerate both the number and significance of instances that require *interpretation* of legal materials, as opposed to a simple *understanding* of them.<sup>9</sup> Where interpretation is necessary, scholars do it badly, advancing universal theories (e.g., originalism, purposivism, textualism)<sup>10</sup> that fail to capture the process of case-by-case argument that is the essence of the decisional process. Those scholars whose work Patterson does like, such as William Eskridge, are themselves misunderstood, taken to advance liberal new doctrines when they are in fact preserving the coherence of the traditional forms or "modalities" of legal argument. Statutory interpretation thus provides a microcosm of Patterson's broader critique, which emphasizes the unique nature of legal argument and expresses a high degree of skepticism toward most contemporary legal theory.

Patterson's critique, while radical, is not without precedent. His emphasis on reasoned, case-by-case argument is consistent with the view of statutory interpretation as practical reasoning, a view associated most prominently with Eskridge and Philip Frickey.<sup>11</sup> Patterson's is a very particular kind of practical reasoning, however, emphasizing the role of doctrine and prudence rather than engaging in the usual debate between textualism and historicism and viewing skeptically nonlegal analogies that might influence the interpretation process. While not necessarily leading to different results, Patterson's approach provides an alternative understanding of major cases and suggests a new agenda for statutory interpretation scholars, who would be urged to spend more time reading cases and other legal materials and (perhaps) less time seeking theoretical justification for their particular interpretive approaches. The example of statutory interpretation thus suggests that, while *Law and Truth* is in many respects a conservative book, it should not be read as a mere apologia for resisting change. Although providing a justification for many traditional methods, Patterson also challenges legal scholars to do their job better, focusing on the actual language of legal argument and resisting the temptation to be what they are not.

Lest it appear that I am unqualifiedly supportive of Patterson's analysis, I must state that I have many serious reservations about Patterson's approach

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9. See PATTERSON, *supra* note 2, at 71-75 (objecting to the "interpretive universalism" of Ronald Dworkin and Stanley Fish, which suggests that all of law is a matter of interpretation, but conceding that interpretation is at times a significant legal activity). Patterson uses the term "interpretation" more broadly than the statutory interpretation theorists do, including, for example, constitutional or other nonstatutory materials; in practice, however, most of his examples involve statutory interpretation cases.

10. For a discussion of these universal interpretive theories, see *infra* notes 69-70 and accompanying text.

11. See Eskridge & Frickey, *supra* note 7; see also, e.g., Daniel A. Farber & Philip P. Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423, 468 (1988) (advocating a practical reason approach to legislative history); Livingston, *Purposivism*, *supra* note 8 (advocating a modified practical reason approach to tax statutes).

and the broader movement to which it lends implicit support. In particular, I am concerned that a more traditional, "internal" view of law may lead to an excessive conservatism in legal teaching and scholarship, marginalizing unconventional approaches and failing to account for non-incremental, radical legal change, which is frequently driven by external forces. I am also concerned that the resulting scholarship may be dry, missing much of the intellectual and emotional energy of the contemporary "law and" movements. To appreciate these objections, however, it is first necessary to explore Patterson's argument on its own terms. Accordingly, I devote much of this Review to that undertaking.

This Review is arranged in four parts. Part I summarizes Patterson's critique of contemporary jurisprudence and his own theory of law as a social, argumentative practice. Part II discusses his approach to statutory interpretation, as suggested by his broader theoretical passages and treatment of individual cases. Part III evaluates *Law and Truth* in the context of previous interpretation scholarship, considering how a Pattersonian judge or scholar might approach a case differently from her predecessors and noting the advantages and disadvantages of that approach. Part IV returns to broader themes, considering Patterson's place in legal scholarship generally and, in particular, in the effort to assert practical reason as a dominant theme in the legal academy. The Review concludes by considering the limitations of Patterson's approach, including the danger of delegitimizing nonlegal modes of argument and the difficulty that his theory may have in accounting for revolutionary or non-incremental change in legal ideas and institutions.

## I

*Law and Truth* is a work of demolition and reconstruction. In his introductory chapter, Patterson poses the question that will serve as his underlying theme: What does it mean to say that a proposition of law is true?<sup>12</sup> Chapters Two through Six present five existing answers to this question, each of which Patterson methodically sets up and then, just as methodically, knocks down. Only in his seventh chapter does Patterson leave any pins standing, and only in Chapter Eight does he present his own, alternative theory.

Existing theories fail, per Patterson, because they ascribe primary importance to economic, philosophical, moral, or otherwise nonlegal formulas in determining the truth of statements of law. Thus, Ernest Weinrib's theory of legal formalism, which emphasizes the "internal coherence" of legal doctrine and the role of law in providing corrective justice to individual

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12. See PATTERSON, *supra* note 2, at 3.

litigants,<sup>13</sup> fails because it assumes—but (in Patterson's view) cannot prove—that internal coherence is superior to other values and that a coherent legal system must necessarily emphasize corrective rather than distributive justice.<sup>14</sup> Michael Moore's moral realism, which holds that law conforms to discoverable ("real") moral truths,<sup>15</sup> fails because it exaggerates the similarities between law and scientific research and cannot explain how the real world exercises an effective check on our assertions of legal norms.<sup>16</sup> H.L.A. Hart's legal positivism, which asserts that social facts, rather than the legal characterization of those facts, are the key to legal meaning,<sup>17</sup> fails because it cannot account for, among other things, the different interpretations that lawyers attribute to the behavior of enacting legislators, even when it is agreed that the legislators followed a single, correct procedure.<sup>18</sup>

Finally—and most important for our survey—the various theories of law as interpretation fail because they exaggerate the importance of interpretation as opposed to understanding of legal materials and cannot account for the actual practice of legal argument. Dworkin's jurisprudence, which emphasizes the moral principles underlying law and sees judges and other lawmakers as

13. See ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 1-21 (1995) (setting forth the internal intelligibility or coherence of legal doctrine as an alternative to various "law and" approaches); Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949, 961-66 (1988) (describing the "immanent intelligibility" of law and its relevance to a revived formalist approach).

14. See PATTERSON, *supra* note 2, at 22-42; cf. Weinrib, *supra* note 13, at 1006 ("Loss-spreading, . . . like all external goals, is a matter for distributive justice and cannot be coherently achieved within the relationship of doer and sufferer (i.e., corrective justice)."). For example, Patterson argues that Weinrib dismisses law and economics as incoherent without establishing that the "immanent" coherence of law is superior to that of law-and-economics theory. See PATTERSON, *supra* note 2, at 35 n.70; cf. Weinrib, *supra* note 13, at 968 n.48 (emphasizing the circularity of Richard Epstein's law-and-economics approach). Patterson shares Weinrib's resistance to external formulas, but regards the latter's search for coherence as merely another such formula. See PATTERSON, *supra* note 2, at 35-39. Patterson prefers an emphasis on law as a social, argumentative practice; "coherence" for Patterson is a descriptive term for a well-functioning legal system rather than an overriding rule to which other norms are secondary or subservient. See *infra* notes 27-32 and accompanying text.

15. See Michael S. Moore, *The Interpretive Turn in Modern Theory: A Turn for the Worse?*, 41 STAN. L. REV. 871, 881-90 (1989) [hereinafter Moore, *Interpretive Turn*]; Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277, 286 (1985).

16. See PATTERSON, *supra* note 2, at 43-51; cf. Moore, *Interpretive Turn*, *supra* note 15, at 882-83 (arguing that a legal realist must apply "metaphysical" notions of scientific and moral truth in interpreting a statute). Chapter Three of *Law and Truth* also includes a discussion of David Brink's "natural kind semantics," see David O. Brink, *Legal Theory, Legal Interpretation, and Judicial Review*, 17 PHIL. & PUB. AFFS. 105, 116-19 (1988); David O. Brink, *Semantics and Legal Interpretation (Further Thoughts)*, 2 CAN. J.L. & JURISPRUDENCE 181, *passim* (1989), which Patterson rejects for similar reasons, see PATTERSON, *supra* note 2, at 51-58.

17. See H.L.A. HART, *THE CONCEPT OF LAW* 269 (2d ed. 1994) ("According to my theory, the existence and content of the law can be identified by reference to the social sources of law (e.g. legislation, judicial decisions, social customs) without reference to morality except where the law thus identified has itself incorporated moral criteria . . .").

18. See PATTERSON, *supra* note 2, at 59-70. The strengths and limitations of Patterson's critique of Hart and other authors are dealt with in some detail by other reviews, and will not be repeated here. See, e.g., Kress, *supra* note 6 (challenging Patterson's critique of Hart and Dworkin's jurisprudence and suggesting that Patterson himself can be understood as taking a modified positivist position); *Law, Truth, and Interpretation*, *supra* note 6 (presenting various authors' views of Patterson's work and his place in contemporary legal and philosophical discourse).

engaged in an intense, highly personal process of interpretation in order to uncover these principles,<sup>19</sup> fails; it overestimates the degree of interpretation required and assumes (incorrectly) that the making of law is a personal and not a societal effort.<sup>20</sup> Stanley Fish's idea of law as an interpretive community<sup>21</sup> similarly fails because it assumes that lawyers who disagree must be members of different interpretive communities and discounts the possibility of reasoned debate and discussion within one existing community.<sup>22</sup> Patterson takes a special pleasure in demolishing Fish, with whom he has an ongoing intellectual feud.<sup>23</sup>

Only in Chapter Seven does Patterson find a theory—Philip Bobbitt's idea of the forms or "modalities" of constitutional argument—that he appears genuinely to like. According to Bobbitt, constitutional law is defined, not by the effort to maximize some external value (morality, efficiency, coherence, etc.) or by any grand theory of interpretation, but by the use of appropriate modalities in arguing and deciding constitutional issues.<sup>24</sup> Bobbitt identifies six such modalities: historical (emphasizing the intention of the Framers and ratifiers of the Constitution); textual (emphasizing the plain meaning of the words of the Constitution); structural (emphasizing the relationship between different parts of the Constitution); doctrinal or precedential (emphasizing existing doctrines and case law); ethical (reflecting fundamental rights or cultural values); and prudential (seeking to balance the costs and benefits of a particular rule).<sup>25</sup> A lawyer or judge who operates within these modalities

19. See RONALD DWORKIN, *LAW'S EMPIRE* 52 (1986) (defining "constructive interpretation" as "a matter of imposing purpose on an objective practice in order to make of it the best possible example of the form or genre to which it is taken to belong"); RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 81-130 (1977) (describing the rule of moral justification in deciding hard cases).

20. See PATTERSON, *supra* note 2, at 71-98. For a discussion of Patterson's critique of Dworkin and Dworkin's broader jurisprudence, see Michael C. Dorf, *Truth, Justice, and the American Constitution*, 97 COLUM. L. REV. 133 (1997) (book review). For a criticism of Dworkin's earlier work and of "coherence" theories as applied generally to legal materials, see Kenneth J. Kress, *Legal Reasoning and Coherence Theories: Dworkin's Rights Thesis, Retroactivity, and the Linear Order of Decisions*, 72 CAL. L. REV. 369, 400-02 (1984) (noting that coherence theories may make legal rights dependent upon the temporal order in which cases are decided).

21. See STANLEY FISH, *IS THERE A TEXT IN THIS CLASS? THE AUTHORITY OF INTERPRETIVE COMMUNITIES* 338 (1980) [hereinafter FISH, *IS THERE A TEXT?*] ("[T]he fact of agreement, rather than being a proof of the stability of objects, is a testimony to the power of an interpretive community . . ."). *see also* STANLEY FISH, *DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES* 294-311 (1989) (applying his theory to the issue of legal interpretation).

22. See PATTERSON, *supra* note 2, at 99-127.

23. *See, e.g.,* Dennis Patterson, *The Poverty of Interpretive Universalism: Toward the Reconstruction of Legal Theory*, 72 TEX. L. REV. 1 (1993); Stanley Fish, *How Come You Do Me like You Do? A Response to Dennis Patterson*, 72 TEX. L. REV. 57 (1993); Dennis Patterson, *You Made Me Do It My Reply to Stanley Fish*, 72 TEX. L. REV. 67 (1993).

24. See PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* 8-9, 11-30 (1991).

25. *See id.* at 12-13, *quoted in* PATTERSON, *supra* note 2, at 137. Bobbitt's book is concerned specifically with constitutional cases, although its principles appear equally applicable to statutory interpretation and other legal issues. In Chapter Eight of *Law and Truth*, Patterson refers to four generally applicable forms of legal argument (textual, doctrinal, historical, and prudential), omitting the structural and ethical components. *See* PATTERSON, *supra* note 2, at 151-79. In a conversation, Patterson suggested that this omission was intentional, the structural and ethical modalities being specific to constitutional argument.

is engaged in the process of seeking and identifying legal truth. One who steps outside the modalities—for example, a lawyer who argues that abortion should be constitutionally protected because it will help the President carry California in the next election, or because most of his friends think it should be—is no longer engaged in this process. But there is, according to Bobbitt, no metaprocedure for resolving conflicts between the modalities; such resolution is, in the end, a matter of individual conscience, about which theorists (including Bobbitt himself) can offer no particular guidance.<sup>26</sup>

In Patterson's view, Bobbitt is asking the right question: What forms of legal reasoning or argument make a proposition of law true, without recourse to external values?<sup>27</sup> Yet Patterson finds Bobbitt's recourse to conscience to resolve conflict between the modalities troubling.<sup>28</sup> In Chapter Eight, Patterson presents his own answer to this problem. In his view, conflicts between (or within) the modalities are resolved not at the level of individual conscience, but by shared linguistic practices, such as the judicial practice of opinion-giving or the writing of scholarly books and articles that suggest the rightness of a particular outcome or approach.<sup>29</sup> When engaging in such activities, lawyers (or legal scholars) attempt to convince their audiences that their preferred approaches cohere with already agreed-to positions better than any available alternative; or, as Patterson more pithily states, "In choosing between different interpretations, we favor those that clash least with everything else we take to be true."<sup>30</sup> For example, in writing an opinion, a judge seeks to demonstrate that her decision is consistent with existing precedent, while a scholar advancing a new interpretive principle argues that this principle advances commonly accepted legal values better than alternative methods.<sup>31</sup> While individual modalities may be influenced by external values—much as, say, music is influenced by art, or philosophy by science—legal truth is determined, not by reference to such values, but by persuasiveness in the making of legal arguments. Contemporary jurisprudence typically misses this point and accordingly obscures rather than illuminates the

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Bobbitt's (and Patterson's) modalities incorporate some features of universal theories of interpretation but avoid giving primary status to any individual modality. In this sense, they reflect an aspect of the pragmatic or practical reason approach. For further discussion of Patterson's relationship to the practical reason school, see *infra* Part III.

26. See BOBBITT, *supra* note 24, at 184 ("The recursion to conscience is the crucial activity on which the constitutional system of interpretation that I have described depends."), *quoted in* PATTERSON, *supra* note 2, at 143.

27. See PATTERSON, *supra* note 2, at 137.

28. See *id.* at 142-46.

29. See *id.* at 169-79.

30. *Id.* at 172.

31. See *infra* notes 40-58 and accompanying text (describing Patterson's view of various statutory interpretation cases); *infra* notes 59-68 and accompanying text (describing Patterson's view of legal scholarship in the area of statutory interpretation).



nature of law.<sup>32</sup>

Two potential objections to Patterson's line of argument bear mentioning. First, some have argued that Patterson devotes a fair amount of space to critiquing other people's ideas but provides only a sketchy model of his own jurisprudence. In particular, he fails to demonstrate that the forms or modalities of legal argument are any less dependent on external values than (say) Dworkin's moral principles or the efficiency criteria of the law-and-economics movement. Consequently, his own theory is subject to the same critique he directs at opponents.<sup>33</sup> This objection strikes me as largely unconvincing, or in any event not terribly damaging to Patterson's thesis. Patterson argues that law is a self-contained practice having equal standing with science or philosophy, not that it should be isolated from such activities. The suggestion that his modalities reflect external content thus does not undermine his point that legal modalities cannot be understood in terms of external disciplines.<sup>34</sup>

A second objection is that, by emphasizing the modalities of legal argument, Patterson (like Bobbitt before him)<sup>35</sup> places a great deal of pressure on the definition of the modalities, on what constitutes an approved form of legal discourse as opposed to an unapproved and presumably illegitimate mode. Although Patterson himself does not do so, there is a danger that others may use his theory to delegitimize interdisciplinary or other nontraditional modes of argument, particularly those with displeasing implications for the existing legal order. A theory that emphasizes internal coherence and

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32. See PATTERSON, *supra* note 2, at 169-82. Patterson's approach thus attempts to elevate law from a second- to a first-order activity, with its own distinct language and method. Accordingly, one is to understand law on its own terms rather than as an extension of some other discipline. See *id.* at 170 n.69 (citing LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* § 199, at 81 (G.E.M. Anscombe trans., Macmillan 3d ed. 1958) for the proposition that knowledge is an ability manifested in linguistic practices). Patterson's view of law evokes Quine's description of science as a "web of belief" in which the truth of individual statements depends upon their relationship to previous statements already agreed to be true. See *id.* at 151-69, 172; see also *id.* at 158 (citing WILLARD VAN ORMAN QUINE, *Two Dogmas of Empiricism*, in *FROM A LOGICAL POINT OF VIEW* 20, 20-46 (1953) (rejecting the idea of a "basic" unit of knowledge and seeing knowledge as embedded in "the whole of science")).

Patterson's view has echoes—albeit fainter ones—of postmodern philosophy, which abandons the correspondence theory of truth (true statements are true because they correspond to a mind-independent state of affairs) in favor of an emphasis on language (true statements are true because they are established as such in accordance with the rules of a particular linguistic practice). See *id.* at 170 ("For the postmodernist, knowledge is an ability, manifested in linguistic practices."). Whether Patterson needs this intellectual firepower to make his point is debatable, but it helps to establish his unique credentials. He is surely one of the few legal scholars to utilize nonlegal sources in order to show that we really don't need them. See *infra* text accompanying note 97.

33. See, e.g., Bakhurst, *supra* note 6, at 400 (arguing that Patterson's "coherentist" position is in many ways similar to that of Weinrib, which Patterson criticized); Kress, *supra* note 6, at 1922-26 (arguing that Patterson's theory is no less "truth-conditional" than traditional positivist accounts).

34. I have perhaps contributed to the confusion by using the terms "internal" and "external" to describe Patterson's differences with his opponents. These terms, I believe, are useful in exploring the implications of Patterson's work, but they appear nowhere within it. Cf. PATTERSON, *supra* note 2, at 182 ("The law is not isolated from the social and discursive spaces around it. However, law is an identifiable practice, one with its own argumentative grammar. The mistake of so much of contemporary jurisprudence is to think that this grammar is reducible to the forms of argument of another discipline.").

35. See BOBBITT, *supra* note 24, at 11-22 (setting forth the modalities of constitutional argument).

incremental decisionmaking may likewise have difficulty accounting for radical changes in law and legal institutions. This strikes me as a more significant criticism of Patterson's argument, and I shall have occasion to return to it in the pages that follow.<sup>36</sup>

## II

*Law and Truth* is a work of jurisprudence, rather than an essay on interpretation per se, and it contains no generalized discussion of statutory interpretation theory or practice. Yet, a significant portion of the book is devoted to statutory interpretation cases, and Patterson frequently uses such cases to demonstrate the operation of his theory and the limitations of other approaches. This is especially true of Patterson's concluding chapter, in which he presents his own comprehensive vision of law and legal theory.<sup>37</sup> Statutory interpretation may thus be a convenient window through which to observe Patterson's theory in action and to test it against the vagaries of real world experience.

Patterson's views on statutory interpretation may be determined deductively, from his broader jurisprudence, and inductively, from his treatment of individual cases. A review of the latter category suggests that Patterson is critical of decisions that enunciate any one overriding rule or principle of statutory interpretation, particularly when such a principle depends on extralegal theories or norms. Instead, he prefers a balanced approach that seeks to harmonize new with old interpretations and that does the least possible damage to the existing practice and belief within a given area of law. This approach is consistent with Patterson's broader jurisprudence, which emphasizes fidelity to the forms of legal argument and decisions that "clash least with everything else we take to be true."<sup>38</sup> Among contemporary interpretation theories,<sup>39</sup> Patterson's appears closest to a pragmatic or practical

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36. See *infra* notes 101-105 and accompanying text.

37. See PATTERSON, *supra* note 2, at 151-79.

38. *Id.* at 172.

39. The principal contemporary theories of statutory interpretation include the textualist approach associated with Justice Antonin Scalia and Judge Frank Easterbrook, which emphasizes the role of statutory text and is skeptical of legislative history and similar sources, see ANTONIN SCALIA ET AL., *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 23-25 (Amy Gutmann ed., 1997); Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533 (1983); William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990) (discussing textualism and Scalia's role in its resurgence); the "modified intentionalism" associated with Judge Richard Posner and others, which emphasizes the intent of the enacting legislature, see Richard A. Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263 (1982); the purposivist approach originally identified with Henry Hart and Albert Sacks, which emphasizes the search for broad, underlying statutory purposes, see HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS* 1111-380 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994); and the practical reason method most prominently associated with Eskridge and Frickey, which emphasizes a case-by-case approach utilizing textual, historical, and dynamic or "evolutive" (i.e., post-enactment) perspectives depending upon the facts of the individual case, see, e.g., Eskridge & Frickey, *supra* note 7, at 322. To avoid confusion between Patterson's argument and my own interpretation

reason approach, but it exhibits a marked emphasis on doctrinal and prudential considerations, as well as a strong sense of the limited scope of the interpretation (versus simple understanding) of statutes.

Patterson discusses statutory interpretation primarily in the context of two cases: *Riggs v. Palmer*,<sup>40</sup> a nineteenth-century inheritance case, and *United Steelworkers v. Weber*,<sup>41</sup> a highly politicized, 1970s-era Supreme Court decision. *Riggs*, decided in 1889, involved a grandson named as a beneficiary in the will of his grandfather, who apparently did not envision that the grandson would poison him and thereby activate the will.<sup>42</sup> The issue was whether the grandson could inherit despite these facts. The court held that he could not, citing the principle that no person should profit from his own wrongdoing, together with historical precedents for interpreting a statute in a nonliteral fashion when necessary to achieve the underlying goal of the statute.<sup>43</sup> The dissent countered with the equally timeworn principle that no person should be punished twice for the same offense.<sup>44</sup> The majority found its statutory purpose argument to outweigh this latter consideration, noting further that the grandson might never have inherited without the murder and that he had thus not technically been deprived of anything by the court's decision.<sup>45</sup>

*Weber*, decided ninety years later, involved a white worker who sued his employer for so-called reverse discrimination under Title VII of the Civil Rights Act of 1964.<sup>46</sup> At issue was a voluntary affirmative action plan, adopted by a private employer, that provided access to job training programs for black workers with less seniority than white ones.<sup>47</sup> The language of the statute appeared to favor the plaintiff, forbidding employers "to discriminate against any individual . . . because of such individual's race," without any special dispensation for affirmative action programs.<sup>48</sup> But the Court held for the employer, finding that Congress's principal purpose in enacting Title VII was to improve job opportunities for African Americans and that a flat prohibition of voluntary affirmative action programs was inconsistent with this

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of that argument, I postpone a fuller discussion of statutory interpretation theory until Part III

40. 22 N.E. 188 (N.Y. 1889). *Riggs* is discussed primarily in Patterson's chapter on Fish's idea of law as an interpretive community, with a reprise in the concluding chapter of the book. See PATTERSON, *supra* note 2, at 114-17, 123-25, 172-74.

41. 443 U.S. 193 (1979). *Weber* is discussed primarily in Patterson's chapter on legal positivism. See PATTERSON, *supra* note 2, at 64-68.

42. Although I suspect neither the court nor Patterson was aware of this, *Riggs* is thus a close approximation to the famous definition of the Yiddish word *chutzpah*, an individual who murders his parents and then throws himself on the mercy of the court because he is an orphan. See LEO ROSTEN, *THE JOYS OF YIDDISH* 92 (1968).

43. See *Riggs*, 22 N.E. at 189-90.

44. See *id.* at 193 (Gray, J., dissenting).

45. See *id.* at 189-90 (majority opinion).

46. 42 U.S.C. § 2000(e)(1) to (17) (1994).

47. See *United Steelworkers v. Weber*, 443 U.S. 193, 197-99 (1979).

48. 42 U.S.C. § 2000(e)-2(d), cited in *Weber*, 443 U.S. at 200

goal.<sup>49</sup> Thus, a nonliteral interpretation was justified in order to achieve this purpose. A dissent, authored by then-Justice Rehnquist, argued that the historical record was mixed and that the language of the statute supported Weber's position.<sup>50</sup> A concurring opinion by Justice Blackmun questioned the majority's analysis, but held for the employer on essentially two grounds, one doctrinal (a contrary holding would negate precedents sanctioning voluntary affirmative action plans) and the other prudential (a contrary holding would make it difficult for employers to avoid liability for past discrimination against blacks without encouraging litigation by displaced whites).<sup>51</sup>

*Riggs* and *Weber* are very different cases, but Patterson's responses to them are strikingly similar. In each case, Patterson prefers the opinion that he believes causes the least damage to existing doctrine and precedent—what might be called the Quinean web or "force field" of existing decisional law.<sup>52</sup> He shows a particular fondness for prudential or practical considerations, especially when they are buttressed by doctrinal concerns. Thus, in *Riggs*, Patterson prefers the majority's approach, which demonstrates a broad awareness of historical precedents regarding the nonliteral interpretation of statutes, to that of the dissent, which appears to him literal and cramped.<sup>53</sup> He further emphasizes the practical consequences of the decision, noting that the majority's opinion could not take property away from the grandson because the issue was whether he was rightfully entitled to the property in the first place.<sup>54</sup> Similarly, with respect to *Weber*, Patterson lauds Blackmun's concurrence for its emphasis on prudential considerations and its faithfulness to existing Title VII decisions, which enable Blackmun to avoid (in Patterson's view) a sterile debate regarding the legislative intention behind the Civil Rights Act. As Patterson explains it, "By fitting his prudential arguments within the fold of precedent, Blackmun breaks free of the intractable differences between the majority and the dissent, thereby enabling him to write an opinion that is far more persuasive than its competitors."<sup>55</sup>

While emphasizing doctrinal and prudential concerns, Patterson remains skeptical of universal interpretive principles, particularly of a simplistic

49. See *Weber*, 443 U.S. at 200-09.

50. See *id.* at 219-55 (Rehnquist, J., dissenting).

51. See *id.* at 209-16 (Blackmun, J., concurring).

52. See *supra* note 32.

53. Patterson argues:

Through careful and wide-ranging comparison with other areas of law, the majority shows the problem at issue to be long-standing and, more importantly, that its solution is consistent with other solutions to problems of textual meaning. In short, the success of the majority's argument is to be explained in terms of its showing the degree to which it can be made to cohere with everything else we take to be true about legal texts . . . .

PATTERSON, *supra* note 2, at 174.

54. See *id.*

55. *Id.* at 67. Patterson especially lauds Blackmun for "weaving" doctrine and prudence together in his opinion: "The measure of good and bad effects employed by Blackmun comes not from a utilitarian calculus, but from precedent." *Id.*

purposivism that requires a single, overriding purpose to be ascribed to a particular statute. In this vein, he criticizes Fish's reading of *Riggs*, which assumes that the majority and dissent ascribed differing underlying purposes to probate law—ensuring that the law would never operate to benefit a wrongdoer versus ensuring orderly dissolution of property—and that the differences between the opinions are explicable on this basis.<sup>56</sup> In fact, Patterson argues, the statute had, not one, but two or more competing purposes, as both the majority and dissenting opinions recognized; the issue was which purpose was more significant under the particular facts, and the majority's interpretation was simply more persuasive on this point.<sup>57</sup> Similarly, regarding *Weber*, Patterson (together with Eskridge) finds the search for a single predominant purpose of Title VII unproductive and praises Blackmun's concurrence for avoiding this line of analysis.<sup>58</sup>

Patterson further develops this approach—coupling a pragmatic and balanced view of statutory interpretation with a dislike for universal theories—in his closing chapter, in which he presents his theory of law as an argumentative practice.<sup>59</sup> Here, after completing his discussion of *Riggs*, he turns to the broader issue of statutory interpretation theory and thus (implicitly) away from

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56. See FISH, IS THERE A TEXT, *supra* note 21, at 278-81.

57. See PATTERSON, *supra* note 2, at 115-16 (describing Fish's view of *Riggs* as "wildly inaccurate" and noting that both the majority and the dissent recognized the existence of more than one legislative purpose). Patterson's view of *Riggs* also differs, albeit more incrementally, from that of Dworkin, who uses the case to demonstrate the existence of legal principles that compete with specific laws (e.g., that no man should profit from his own wrongdoing) and thereby to discredit the positivists' emphasis on hard and fast legal rules. See DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 19, at 22-45. Patterson no doubt shares Dworkin's rejection of positivism, but he would likely be skeptical of Dworkin's reliance on moral principles to determine the correct legal outcome.

58. See PATTERSON, *supra* note 2, at 64-68; see also William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1488-94 (1987) (rejecting the *Weber* Court's search for a predominant legislative purpose of Title VII).

Besides *Riggs* and *Weber*, Patterson discusses three cases in the text of his book. The first, *Lamb v. London Borough of Camden*, 2 All E.R. 408 (C.A. 1981), is used as an example of Ernest Weinrib's theory of legal formalism and coherence, which Patterson eventually finds unconvincing. See PATTERSON, *supra* note 2, at 31-35; see also Weinrib, *supra* note 13, at 1006-07. The second, *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892), is a statutory interpretation classic that Patterson cites for the proposition that a statute may require interpretation when one set of facts is at issue, but may appear quite clear on an initial reading when applied to a different set. See PATTERSON, *supra* note 2, at 95-96. A third decision, *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979), is borrowed from Judge Posner's work on statutory interpretation to demonstrate the limitations of interpretive canons, the facts of the case are not discussed. See PATTERSON, *supra* note 2, at 175-76; see also Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 813 (1983).

59. I focus in this discussion on those relatively few pages in which Patterson specifically addresses statutory interpretation cases and issues. In a broader sense, the entire chapter could arguably be read as a theory of statutory interpretation, since Bobbitt's six modalities—historical, textual, structural, doctrinal, ethical, and prudential—appear no less applicable to statutory than constitutional interpretation and Patterson's own discussion primarily emphasizes statutory cases. I think, however, that such a characterization would be a bit too clever, for two reasons. First, Bobbitt is avowedly discussing constitutional cases; it may well be that he would utilize the same modalities in statutory decisions, but it seems fairest to let him decide this. Second, I am uncomfortable reading Patterson, who generally downplays the significance of interpretation, as primarily an interpretation theorist. It seems more honest to see statutory interpretation as one small but important aspect of Patterson's argument and to deduce his views on the subject from those passages in which he specifically deals with it.

the role of judges to that of legal teachers and scholars.<sup>60</sup> Specifically, Patterson considers two scholarly arguments. The first is Judge Richard Posner's critique of interpretive canons regarding legislative history, which Patterson cites as an effective example of argument about the content of an individual modality (in this case, historical argument).<sup>61</sup> The second is Eskridge's appeal for "dynamic" statutory interpretation, which takes into account political and social changes occurring after the enactment of a statute, and which constitutes a more radical argument over the nature of an argumentative mode.<sup>62</sup>

Patterson's primary concern is not with the substance of Posner's or Eskridge's arguments but with the way in which these scholars make them. In Patterson's view, what they and other legal scholars do is merely another version of what judges do in deciding an individual case; that is, they convince us of something new by demonstrating its consistency with older, already agreed-to concepts and beliefs. Thus, Posner uses the accepted rationale for historical argument—that it is based on a realistic understanding of the lawmaking process—to demonstrate that many existing interpretive canons are based on unduly optimistic assumptions about that process and should, accordingly, be changed.<sup>63</sup> Similarly, Eskridge shows that a traditional approach to legislative history fails to deal adequately with changing or unforeseen circumstances and argues for a dynamic interpretation that takes these later changes into account.<sup>64</sup> Eskridge's critique is broader than Posner's—he deals with the very nature of historical argument rather than with specific applications—but his mode of argument is the same, reasoning from generally accepted norms and values to new, more controversial proposals. Both Posner and Eskridge, that is, make quintessentially legal arguments, and they succeed precisely because they are able to make their arguments fit the "web" of established belief and practice in the relevant field.<sup>65</sup>

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60. In Patterson's schema, the first discussion of *Riggs* concerns the criteria for choosing among forms of argument in cases of conflict, while the second concerns the content of the forms of argument themselves. See PATTERSON, *supra* note 2, at 172, 174.

61. See *id.* at 174-76. Posner's argument is set forth in RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 286-93 (1985); and Posner, *supra* note 58, at 811-14.

62. See Eskridge, *supra* note 58.

63. See PATTERSON, *supra* note 2, at 174-76 (discussing Posner, *supra* note 58, at 811). For example, the canon of *expressio unius est exclusio alterius* ("the expression of one thing is the exclusion of another," BLACK'S LAW DICTIONARY 581 (6th ed. 1990)) makes sense if all legislative omissions are deliberate, which they are not. See PATTERSON, *supra* note 2, at 175.

64. See PATTERSON, *supra* note 2, at 176-79 (discussing Eskridge, *supra* note 58, at 1483). For example, the *Weber* Congress failed to anticipate that the effects of discrimination would persist even if individuals were no longer consciously prejudiced, so resort to post-enactment changes was appropriate in this case. See *id.* at 177.

65. See, e.g., *id.* at 178 (describing Eskridge's argument as "something new and different . . . but in a distinct way," namely, a way that uses traditional criteria to demonstrate the limitations of existing historical argument and the need to expand it in appropriate cases). Patterson's reading of Eskridge differs in some respects from Eskridge's own, which emphasizes the differences between dynamic interpretation and historical argument as previously understood. See Eskridge, *supra* note 58, at 1479 ("Traditional doctrine teaches that statutes should not be interpreted dynamically.").

Patterson's concern here is with the nature of legal argument rather than statutory interpretation specifically, but his discussion is of interest to us for two reasons. First, while he avoids endorsing any one theory, Patterson is plainly sympathetic to Eskridge's dynamic model, which he sees as a reasonable, even necessary, extension of historical argument. Together with his earlier comments on *Riggs* and *Weber*, this chapter would appear to place Patterson closer to Eskridge, Frickey, and other advocates of pragmatic or "practical reason" interpretation—including a dynamic perspective where appropriate—than to advocates of textualist or other theories.<sup>66</sup>

Second, Patterson's reading of Posner and Eskridge has significant implications for interpretation scholars. If truth in law is a matter of successful application of the forms of legal argument, and if this is just as true of legal scholarship as it is of judicial opinions, there may be relatively little need for recourse to nonlegal sources in the interpretation debate. Much of contemporary interpretation scholarship, with its extensive reliance on Biblical hermeneutics, literary theory, and other external referents,<sup>67</sup> may thus be entertaining but irrelevant, the real issue being the consistency of any interpretive method with other, uncontested portions of the existing legal universe. This is in some respects a more profound point than Patterson's opinion of particular specific interpretive methods, and we shall have occasion to revisit it in our later discussion.<sup>68</sup>

### III

As best as can be determined, then, Patterson's view of statutory interpretation is something like the following: Interpretation (including statutory interpretation) is less important in law than it is usually thought to be; it is subsidiary to understanding and capable of taking place only against the background of a nonreflective linguistic practice. When it does take place, interpretation should be conducted like any other argumentative practice, seeking outcomes that cause the least damage to results and interpretations previously agreed to be true. Various modalities or forms of argument (e.g., textualism) are appropriate in statutory as well as constitutional interpretation,

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66. The issue of practical reason is discussed further *infra* Part III.

67. A LEXIS search for law review articles containing the terms "statutory interpretation and (Bible or literature)" was interrupted because it was likely to produce more than 1000 entries. Search of LEXIS, LAWREV Library, ALLREV File (Oct. 30, 1997). For a (very) brief sample of this scholarship, see generally *INTERPRETING LAW AND LITERATURE: A HERMENEUTIC READER* (Sanford Levinson & Steven Mailloux eds., 1988), which collects articles on legal and literary interpretation; William N. Eskridge, Jr., *Gadamer/Statutory Interpretation*, 90 COLUM. L. REV. 609 (1990), which discusses hermeneutic theory; and *Interpretation Symposium*, 58 S. CAL. L. REV. at 1 (1985), which collects articles on interpretive methodologies from various nonlegal disciplines, including literature, religion, and the physical sciences. For an unusual approach to constitutional law, emphasizing parallels between legal and religious interpretation, see SANFORD LEVINSON, *CONSTITUTIONAL FAITH* (1988).

68. See *infra* Part IV.

but no one of these must be elevated above the others, and the argument over the primacy or content of these argumentative forms should be conducted in the same manner as the application of the forms themselves—that is, by choosing the method or process that is least inconsistent with accepted methods or processes. Dynamic or evolutive considerations are an appropriate and, indeed, vital part of historical argument. One should be suspicious of all-purpose interpretive principles, purposivist or otherwise, just as one should be suspicious of theories that elevate interpretation generally to the center of legal discourse.

What are the consequences of this view, and how does it differ from the views of previous authors? How might a Pattersonian judge decide a statutory interpretation case, and what sort of interpretation scholarship would a Pattersonian scholar produce?

To answer these questions, a brief detour may be appropriate. For the mountains of ink spilled on the subject in recent decades, there remain perhaps four basic approaches to statutory interpretation.<sup>69</sup> The first of these, textualism, regards the statutory text as the primary and in some cases exclusive source of statutory meaning; when the immediate text does not answer the relevant question, this approach recommends that one look elsewhere in the relevant statute rather than consult legislative history or other sources. The second, intentionalism, emphasizes the intent of the enacting legislature and tolerates consultation of committee reports and other legislative history, at least when the statutory language is ambiguous or unclear. The third, purposivism, is similar to the second, but emphasizes a search for the underlying goals or policy of a statute rather than the intent behind each specific provision. Textualism is most famously associated with Justice Scalia; intentionalism with Judge Posner; and purposivism with the legal process approach of H.L.A. Hart and Albert Sacks. As a general rule, textualism has undergone a resurgence in recent years, and purposivism something of a decline, with intentionalism probably remaining the faith of most judges but increasingly coming under attack for its intellectual limitations and the difficulty of its application in actual cases.<sup>70</sup>

The practical reason method, associated with Eskridge, Frickey, and others, may be seen either as a fourth method or as a combination of the other three. Abjuring any single foundation, practical reason emphasizes a pragmatic, case-by-case approach, utilizing the textual, historical, and dynamic or evolutive (i.e., post-enactment) perspectives in varying proportions depending upon the

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69. This typology is taken largely from Eskridge & Frickey, *supra* note 7, at 321-45. For representative samples of each of the four genres described in this paragraph, see sources cited *supra* note 39.

70. See generally William S. Blatt, *The History of Statutory Interpretation: A Study in Form and Substance*, 6 CARDOZO L. REV. 799 (1985) (tracing the history of statutory interpretation from Blackstonian notions of equity to the contemporary period).



age and specificity of the statute in question and changes in public values or policy context since the statute was enacted.<sup>71</sup> In appropriate cases, the court would also consider the various consequences of alternative possible interpretations and its own policy sense. Practical reason traces its intellectual roots to Aristotle<sup>72</sup> but is also a reasonable description of how most courts actually approach cases. It is by now probably the chief intellectual competitor of a purely textual approach.

Patterson's approach is clearly closer to practical reason than to textualism or other foundational methods. His approach, however, focuses on doctrinal and prudential considerations rather than addressing the conflict between "plain meaning" and legislative history—a conflict which forms the focus of much practical reason scholarship on statutory interpretation—and tries to limit the scope of interpretation in a manner reminiscent of the more thoughtful textualist writers. A Pattersonian scholar would likewise have a distinctive agenda, emphasizing the fit of interpretive doctrine with other aspects of the legal system and deliberately deemphasizing nonlegal analogies. Pattersonian judicial and academic practice would thus fit uneasily into the existing categories; it lies closest to practical reason but has its own substantive emphasis and a unique argumentative style.

To observe these differences more closely, consider a case much like *Weber: Bob Jones University v. United States*.<sup>73</sup> In *Bob Jones University*, the IRS sought to revoke a federal income tax exemption for a university and a private secondary school that were found to discriminate among students on the basis of race. The language of the statute appeared to favor the schools, providing a tax exemption for organizations "organized and operated exclusively for religious, charitable, scientific, . . . or educational purposes" and making no mention of racial or other public policy issues.<sup>74</sup> But the Supreme Court, in an opinion by Chief Justice Burger, upheld the revocation, finding that the statute contained an implicit purpose that tax-exempt organizations advance (or, at the very least, not inhibit) public policy and that the schools' discriminatory behavior was accordingly inconsistent with

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71. These sources would typically be considered in declining order, i.e., the textual perspective (if it resolves the case) would be most persuasive, followed by legislative history and, at the base of the triangle, the dynamic or evolutive perspective. The last of these would include not only applicable current values—i.e., enlightened public opinion—but also judicial and administrative precedents decided since enactment, the rough equivalent of Bobbitt's (or Patterson's) doctrinal mode. See Eskridge & Frickey, *supra* note 7, at 353 (providing a schematic representation of the practical reason method). The dynamic perspective becomes more important for older, less specific statutes, especially when there have been significant changes in political or cultural values since the date of enactment. Patterson, by contrast, does not assign a hierarchy to his modalities and appears in many cases to place doctrinal or prudential concerns on a par with textual and/or historical materials. For a further discussion of how Patterson's approach differs from a standard practical reason one, see *infra* text accompanying notes 87-93.

72. See KRONMAN, *supra* note 7, at 41-43 (describing the intellectual roots of the practical reason method).

73. 461 U.S. 574 (1983).

74. I.R.C. § 501(c)(3) (1994).

qualifying for the tax exemption.<sup>75</sup> The Court supported this interpretation with some rather forced historical arguments, emphasizing the statute's origins in the law of charitable trusts and referring to more recent (i.e., post-enactment) developments concerning racial discrimination, including judicial, administrative, and legislative precedents.<sup>76</sup> A concurring opinion by Justice Powell reached the same conclusion but expressed doubts regarding the public policy requirement, which (it argued) might lead to excessive conformity by tax-exempt organizations.<sup>77</sup> A dissent by Justice Rehnquist sharply criticized the majority opinion, arguing that the plain meaning of the statute permitted the exemption and that Congress had taken no action to change this result.<sup>78</sup>

*Bob Jones University* has just about everything in it—legislative purpose, plain meaning, the role of statutory reenactment in ratifying administrative and judicial decisions—and scholars have used it to argue for various theories of statutory interpretation. Thus, taking into account post-enactment changes in public policy and enlightened public opinion, Eskridge cites the case as a model for dynamic statutory interpretation,<sup>79</sup> while Lawrence Zelenak, a tax scholar, uses the case as an example of a “nonliteral,” purposivist interpretation of the Internal Revenue Code.<sup>80</sup> Rehnquist’s dissent, by contrast, emphasizes the danger of a dynamic approach: A court may substitute its own policy analysis for that of the enacting legislature, even in the face of relatively clear statutory language, with no clear guideposts to restrict its discretion.<sup>81</sup> Other authors have advanced different perspectives, emphasizing (inter alia) the special nature of the state’s encounter with insular religious communities<sup>82</sup> and the implications of the case for the scope of IRS administrative power.<sup>83</sup>

How would a Pattersonian judge approach such a case? We can never be sure, but it is likely that she would try, like Justice Blackmun in *Weber*, to escape the textualist-intentionalist dichotomy by appealing to doctrinal and prudential considerations and that she would seek a holding that would minimize the damage to existing law and practice in both tax and

75. See *Bob Jones Univ.*, 461 U.S. at 585-602.

76. See *id.* at 585-92 (discussing charitable trusts and the origins of tax exemptions); *id.* at 599-602 (recounting post-enactment developments).

77. See *id.* at 606 (Powell, J., concurring).

78. See *id.* at 612 (Rehnquist, J., dissenting).

79. See Eskridge, *supra* note 58, at 1546-48 (citing *Bob Jones University* as a case in which the Court applied a Hart and Sacks “modified intentionalist” approach, but which would have been better decided using a dynamic method).

80. See Lawrence Zelenak, *Thinking About Nonliteral Interpretations of the Internal Revenue Code*, 64 N.C. L. REV. 623, 626 (1986) (describing *Bob Jones University* as a case in which the Court was relatively candid about adopting a nonliteral interpretation).

81. See *Bob Jones Univ.*, 461 U.S. at 622 (Rehnquist, J., dissenting).

82. See, e.g., Perry Dane, *The Public, the Private, and the Sacred: Variations on a Theme of Nomos and Narrative*, 8 CARDOZO STUD. L. & LITERATURE 15 (1996) (suggesting that the Court took an unnecessarily narrow view of the issues at stake in *Bob Jones University*).

83. See, e.g., Charles O. Galvin & Neal Devins, *A Tax Policy Analysis of Bob Jones University v. United States*, 36 VAND. L. REV. 1353 (1983) (suggesting that *Bob Jones University* unduly expanded the rulemaking authority of the IRS at the expense of Congress and the judicial branch).

discrimination law. From a doctrinal perspective, a Pattersonian judge might consider the weight of judicial authority against racial discrimination by academic institutions, as well as the likely damage to tax and nontax Supreme Court precedents if the taxpayers prevailed in the case. On a prudential level, she would consider the practical effects of such a decision, including the possible drain of students from public secondary schools if segregated academies received an effective tax subsidy from the federal government. In addition, she would note the resultingly high probability of congressional action to reverse such a holding. Finally, a Pattersonian judge would be sensitive to the "local" features of the tax code and whether it had historically been interpreted in a manner different from other statutes.<sup>84</sup> In each of these matters, the actual practice of law, as opposed to its theory, would be of paramount interest. Thus, Rehnquist's argument that antidiscrimination policy is better left to Congress would carry relatively little weight if Congress had historically delegated such power to the courts and the expectation of all parties was that such delegation would continue. Similarly, an argument favoring literal interpretation of the tax code would be unpersuasive if tax lawyers did not, in fact, use the code in this way.<sup>85</sup> A Pattersonian judge might thus reach the same holding as the Supreme Court, but would do so for different reasons.<sup>86</sup>

Of course, many of these elements—a concern for real world implications, attention to relevant post-enactment developments, and so forth—are reflected in the practical reason method of Eskridge, Frickey, and others. But Patterson differs from the typical practical reason analysis in several important respects. First, Patterson places a greater emphasis than most scholars on doctrinal considerations (the so-called "web" of legal belief and practice in a given area of law),<sup>87</sup> which are near the bottom of the Eskridge/Frickey pyramid.<sup>88</sup> Where Eskridge sees *Bob Jones University* as primarily a conflict between the historical and evolutive perspectives<sup>89</sup>—what did Congress mean when it drafted the relevant statute and how would it approach the same issue

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84. On the "local" (i.e., distinctive) features of the tax code, see Livingston, *Legislative History*, *supra* note 8, at 826-31 (noting that tax law is distinguished by a high level of detail, frequent revision, and a contextual interpretive tradition). *But see* BORIS I. BITTKER, *FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS* ¶ 4.2.1 (1981) ("Viewed in the perspective of history . . . the Internal Revenue Code is just another statute, which suffers from the same ailments that have afflicted legislative enactments since Parliament first tampered with the common law.").

85. *See, e.g.*, Zelenak, *supra* note 80 (arguing that the tax code is often interpreted in a nonliteral fashion).

86. Or, she might reach a different holding. Patterson ascribes a relatively narrow range to statutory interpretation and might conclude, like Rehnquist, that the plain language of I.R.C. § 501(c)(3) (1994) precluded any interpretation at all.

87. *See* PATTERSON, *supra* note 2, at 64-68 (discussing *Weber*); *id.* at 114-17 (discussing *Riggs*); *id.* at 169-79 (providing a model of law as an argumentative practice and applying that model to individual cases).

88. *See supra* note 71.

89. *See* Eskridge, *supra* note 58, at 1546-49 (discussing *Bob Jones Univ.*)

today?—a Pattersonian judge would be more interested in the weight of judicial authority and the effect of alternate holdings on previously settled areas of law. Thus, she would embrace a “dynamic” reading of a statute only if that reading was necessary to protect expectations developed in other legislation or in judicial and administrative decisions.

Second, and relatedly, a Pattersonian judge would place relatively little faith in interpretation theory as conventionally defined. The dictionary meaning or nonlegal usage of terms like “educational,” “charitable,” and so forth would be of relatively little interest to her, and—while she would surely consider historical evidence regarding development of the charitable tax exemption—she would be more concerned with the current state of statutory and decisional law in the area. Public opinion (however enlightened) would likewise be less important to her than specifically legal decisions and practice. One has the sense that, if different perspectives conflicted, a Pattersonian judge would be more likely to favor doctrinal or precedential considerations than would an Eskridgian or similar actor. Indeed, a Pattersonian judge might not see the case as a question of interpretation at all, but as a matter of reconciling nontax precedents against racial discrimination with the special history and character of tax practice, and doing so with the least possible damage to both areas of law.<sup>90</sup>

A Pattersonian scholar, writing about *Bob Jones University* or similar cases, would similarly have a distinctive agenda. Contemporary scholars tend to emphasize the importance of interpretation (so-called “interpretive universalism”) and to rely extensively on literary, religious, and other nonlegal analogies in making their arguments.<sup>91</sup> A Pattersonian scholar might write less about these issues and more about the specifically legal implications of different interpretive methods: How do judges actually decide statutory cases? What assumptions about the legislative process, and the competence of legal institutions, are built into this process, and are these assumptions consistent with actual legislative practice? What is the track record of different interpretive methods in producing convincing and long-lasting results—results that, in Patterson’s parlance, become part of the “web” of accepted belief and practice? Is this track record consistent across legal categories, or does it vary depending on the subject and character of the law being interpreted? These “local” questions, rather than the latest in Biblical hermeneutics or Continental

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90. In a literal sense, any resolution of *Bob Jones University* would involve statutory interpretation, since a statutory provision (§ 501(c)(3) of the Internal Revenue Code) was at issue. A decision that emphasized the “web” of legal beliefs and practice in the case, however, would look very different from one that emphasized interpretation theory or the possible meanings of the statutory language. For a broader view of the issues at stake in *Bob Jones University*, see Dane, *supra* note 82, at 44–45 (suggesting that the Court should have considered the relationship of the Internal Revenue Code “not just to snatches of the common law of charities, but to the full panoply of legal visions of religion and religiously-bound institutions”).

91. See sources cited *supra* note 67.

philosophy, would occupy his attention, and he would tend to see statutory interpretation as one small part of a broader legal process, rather than as a link to an outside, nonlegal world.<sup>92</sup>

A Pattersonian scholar would, in short, take the interpretation debate back to its origins, to the real world of laws and decisions. That might not be altogether a bad thing. In arguing for a particular method, he would emphasize the method's fit with other aspects of a healthy and mature legal process rather than with assorted nonlegal doctrines, and he would spend his time reading cases and statutes in place of philosophical treatises. Above all, he would be modest in his ambitions, emphasizing the limited scope of his recommendations and of legal interpretation as a whole. His true mentors would not be the postmodern philosophers, but instead the 1950s legal process school associated with Hart and Sacks, whose work similarly emphasized the special nature of legal discourse and saw statutory interpretation as one part of a broader legal process analysis.<sup>93</sup>

#### IV

This "back to basics" spirit—the need to resist the allure of external formulas and return to the essential building blocks of legal argument—is indeed a more general theme of *Law and Truth*. Whether intentionally or not, Patterson has constructed a powerful brief for a return to tradition in legal teaching and scholarship, for a renewed emphasis on cases, statutes, and other conventional legal materials, and for less attention to nonlegal sources. If law is, in fact, a "first-order" argumentative practice, and if nonlegal analogies do not clarify but instead obscure the true nature of law, then it is hard to escape the conclusion that most contemporary jurisprudential scholars are engaged in a dead-end pursuit. The legal academy of 1960, with its internal view of law and legal reasoning, was at least asking the right questions; today's academy, with its search for external validation, is not. By seeking truth everywhere except our own backyard, we are actually getting further away from it.

The warning sounded by Patterson is an increasingly common one in the legal academy, although rarely presented in so compelling a manner. It is

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92. See PATTERSON, *supra* note 2, at 181-82. Patterson writes:

[My] point of view counsels a return to the local . . . . And what do I mean by "the local"? Skeptical as I am of jurisprudential projects that seek to underwrite the legitimacy of law by recourse to something outside law (e.g., economics or moral philosophy), I would urge more careful attention to the ways in which different areas of the law employ the forms of legal argument . . . . A historical account of these developments is, potentially, quite interesting

*Id.*

93. Patterson differs from Hart and Sacks in his skepticism about legislative purpose and (what is really the same thing) in his less idealistic view of legislation, but resembles them in his emphasis on legal process and in stressing the relatively narrow range of interpretation as opposed to understanding of everyday statutory language.

present in Anthony Kronman's book, *The Lost Lawyer*,<sup>94</sup> which laments the decline of the "lawyer-statesman" and his defining trait of "practical wisdom" and the rise of the economically motivated practitioner in the law firm and the economics- or philosophy-driven professor in the law school.<sup>95</sup> It is present in bar association reports that seek to "bridge the gap" between legal teaching and practice and to refocus the academy on legal as opposed to academic concerns.<sup>96</sup> At a colloquial level, it is reflected in the complaint of countless law students to their more theoretically minded professors: "We want to learn the law!"

What is unusual about Patterson is that he uses the tools and language of analytic philosophy to make a case for what is, essentially, an old-fashioned approach to legal teaching and scholarship; he uses the philosopher's own magic, so to speak, to prove that we do not really need the philosopher. In his formulation, the philosopher's postmodernism and the lawyer's practical wisdom become one: We return to law, not because we are afraid of modernity, but because we have surpassed it, because postmodern thought teaches us that legal truth is no better—but just as surely no worse—than any other truth.<sup>97</sup> The true sophisticate, according to Patterson, is she who disclaims sophistication, who engages in the competent and effective practice of law without the need for outside approval or validation.

It is a beguiling concept, and one with considerable appeal to legal scholars buffeted by a generation of nonlegal "-isms." Is it also a convincing one? Should lawyers (and law professors) indeed "return to the local," abandoning the effort to justify themselves with a range of external materials?

The answer, I think, depends upon one's reading of Patterson and the uses to which his argument is put. To the extent that Patterson makes an intellectual case for law as a distinct argumentative practice and criticizes others for relying on nonlegal formulas, he commands strong ground. I share his sense that meta-theories, from Dworkin's to Fish's to Posner's, have hit diminishing returns. There is also something refreshing about his focus on the actual language of legal argument, both as a scholarly subject matter and as the distinguishing feature of law. Unlike most contemporary theorists, Patterson

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94. KRONMAN, *supra* note 7.

95. *See id.* at 11-52.

96. *See, e.g.,* AMERICAN BAR ASS'N, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION—NARROWING THE GAP (Robert MacCrate ed., 1992). Here again, the issue of practical as opposed to theoretical law teaching is distinct from the issue of traditional versus nontraditional legal scholarship, but they share common themes and are frequently discussed in tandem by Kronman and other authors. *See, e.g.,* KRONMAN, *supra* note 7, at 165-270 (discussing teaching and scholarship in law schools).

97. *See supra* note 32 (discussing Patterson's use of postmodern thought to establish that law is a social and argumentative practice having equal standing with science, philosophy, or other self-contained disciplines). It should be noted that Patterson's use of postmodernism remains within the tradition of analytic philosophy and differs from the work of Jacques Derrida and other linguistic theorists associated with the postmodern label. *See* Dennis Patterson, *Postmodernism/Feminism/Law*, 77 CORNELL L. REV. 254, 313 n.276 (1992) ("In the end, Derrida is just a skeptic—Hume in the cafe.").

does not pretend that lawyers, in practicing law, are actually doing something else—they are doing what they seem to be doing, and the key to understanding them is simply to listen more closely. Patterson's approach also takes practicing lawyers and legislators seriously, while many jurisprudential theories seem excessively focused on judges and their decisions.

Yet if *Law and Truth* is a convincing and even pathbreaking work, it has some troubling implications. My worry is less with the internal structure of Patterson's argument than with the uses to which others, especially the more partisan traditionalists, may put it. I have three principal concerns in this area.

First, a theory of law as a linguistic or argumentative practice places a great deal of pressure on the definition of the practice—the rules of the game, so to speak. What counts as a prudential or, for that matter, a historical argument? How would one account for an argument that the entire structure of family law was suspect because of its patriarchal origins,<sup>98</sup> or that juries should nullify verdicts against black defendants because of the allegedly pervasive racism of the criminal justice system?<sup>99</sup> Would these merely be extreme examples of acceptable discourse, or are they outside the modalities and hence (presumably) illegitimate? What of international or choice-of-law cases, in which the issue is the clash of competing practices and outlooks? Patterson finesses these problems by emphasizing examples of legal arguments (those of Eskridge, Posner, and so forth) of which he by and large approves. But the issue of illegitimate argument must come up if the modalities are to have any meaning, and this issue raises the specter of traditional theorists attempting to delegitimize critical or unconventional discourse as beyond the pale of the acceptable. The linguistic practice model similarly places great demand on the assignment of competence: Are only trained lawyers permitted to play the game, or is it open to qualified outsiders—and who (if anyone) is qualified to make this judgment?<sup>100</sup>

Second, and relatedly, a linguistic theory may have difficulty in accounting for rapid, nonincremental developments in the law. If judges and scholars always make decisions consistent with an existing "web" of outcomes and beliefs, then why do things ever change? Why are old truths sometimes rejected and new ones advanced in their place? In the scientific field, this

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98. See, e.g., MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* (1995).

99. See Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677 (1995).

100. When I presented this criticism to Patterson in person, he dismissed it as "less than trivial," insisting that he is merely describing the nature of law and has no interest in legitimizing or delegitimizing any particular form(s) of legal argument. While this is no doubt Patterson's intention, I remain concerned that others will use his and Kronman's work to marginalize divergent perspectives and to uphold a more-or-less traditional outlook on legal problems. A "modal" view of legal argument necessarily implies that there are arguments outside the modalities and places great power in the hands of those in a position to determine what they might be. On the implicit political content of practical reason scholarship, see Jay M. Feinman, *Practical Legal Studies and Critical Legal Studies*, 87 MICH. L. REV. 724 (1988) (correspondence).

question has been addressed by Thomas Kuhn's theory of scientific revolutions, in which paradigms shift and a new web is constructed on the remains of the old.<sup>101</sup> Patterson does not address the equivalent issue for law, and it remains largely beyond the scope of his book. But it would be interesting to see him deal with, say, the decision in *Brown v. Board of Education*,<sup>102</sup> or the decline of substantive due process in the late 1930s,<sup>103</sup> or rapid legislative change like the New Deal or the Tax Reform Act of 1986.<sup>104</sup> It is, of course, possible to squeeze such events into an incremental framework; the *Brown* decision may be seen as resolving a contradiction between exclusionary racial policies and a broader framework of inclusion and equality, or the Tax Reform Act as bringing tax law closer to its originally intended goals. But these descriptions appear somewhat stretched, and there do seem to be times in which the normal rules cease to apply and in which the boundary between legal and nonlegal discourse is more readily crossed. It would be useful to have an account of these instances.

Finally, I am concerned that Patterson's approach, and the revival of practical reason generally, could cause an excessive conservatism in legal scholarship, discouraging scholars from using even appropriate nonlegal materials and from addressing many potentially interesting questions. Even if the great majority of law consists of nonreflective linguistic practice, it is the occasional exception to this rule that is likely to prove the most interesting. Similarly, while social science and philosophy may be irrelevant for most legal issues, they are likely to matter most precisely when the issues—e.g., racial discrimination, abortion, international human rights—are the weightiest and most controversial. Put differently, while the need to look to external considerations may be exceptional in everyday legal practice, at the frontiers of legal inquiry these considerations will continue to be regular fare.<sup>105</sup> As a corrective to "law and" excesses, practical reason is welcome, but it must not be permitted to crowd out other scholarly approaches.

What these criticisms suggest is that *Law and Truth* is not so much a flawed book as an incomplete one. Its impact thus depends largely on how others use it and on how Patterson follows up on his own work. If Patterson

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101. See THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (1962). The problem of discontinuous legal change is especially acute for legislation, which may not be subject to the same standards of coherence or precedence as judicial decisions; indeed, the question arises whether "truth" is a relevant value for the category of legislation, and if so what truth it should be. See Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 HARV. L. REV. 1055 (1997); see also William N. Eskridge, Jr., *Gaylegal Narratives*, 46 STAN L. REV. 607 (1994) (assessing the role of narrative or "story-telling" in promoting new perceptions that result in legal change).

102. 347 U.S. 483 (1954).

103. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 8-5 to -6 (2d ed. 1988) (analyzing the demise of *Lochner v. New York*, 198 U.S. 45 (1908)).

104. Pub. L. No. 99-514, 100 Stat. 2085 (codified as amended in scattered sections of 26 U.S.C.).

105. Cf. Posner, *supra* note 7, at 1653-54 ("In a period of change, systemic questions become more interesting, more urgent, than doctrinal ones. . . . [L]egal reasoning is, essentially, debaters' reasoning; and debaters' reasoning will not resolve fundamental clashes of value or difficult empirical questions.").



can offer a more complete account of law as an argumentative practice, and if he and others are able to apply his work to specific areas of law—including those that involve radical or at least more controversial examples of legal change—then he will have written one of the major jurisprudential works of his generation. If these efforts are not undertaken and the book is used largely as an excuse to do what traditionalists were already doing anyway, its effect will be far less salubrious. On this last point, I am guardedly optimistic; nevertheless, the outcome remains to be seen.

It may be that the nature of truth, like the existence of God, is beyond the capacity of human beings to prove or disprove. The more relevant, or at least more immediate, question then becomes the effect of the belief on the believers. What do they do differently from others who share different beliefs? Are they better—as people, lawyers, or scholars—than they would otherwise be? Dennis Patterson has made a powerful case that the prevailing beliefs in contemporary jurisprudence are misguided, that they are leading us down the wrong paths. By linking postmodernism with practical reason, he has made himself both a traditionalist and a futurist critic of the existing jurisprudential order. It is an intellectual tour de force, but one that will ultimately be judged by its effects. If Patterson and his compatriots can produce a “local” scholarship that adds to our understanding of law more than the scholarship of Dworkin, Fish, and other universal theorists, the effort will surely have been worth it. If not, he is destined to be another engaging, but ultimately false, prophet. By their fruits will ye know them.

